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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. RONY MATUL SARAT-ROJOP, Appellant.	2 CA-CR 2009-0389 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20073638

Honorable Christopher C. Browning, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General
By Kent E. Cattani and Alan L. Amann
Tucson
Attorneys for Appellee

Isabel G. Garcia, Pima County Legal Defender
By Scott A. Martin
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V Á S Q U E Z, Presiding Judge.

¶1 After a jury trial, Rony Sarat-Rojop was convicted of kidnapping and sentenced to the presumptive, five-year term of imprisonment. On appeal, Sarat-Rojop contends the trial court abused its discretion and violated his constitutional right to present a defense by precluding defense counsel from arguing a "reasonable-doubt theory of defense" during closing argument. For the reasons stated below, we affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to sustaining the conviction. *State v. Cropper*, 205 Ariz. 181, ¶ 2, 68 P.3d 407, 408 (2003). Iris R., her husband Marvin H., and his brother shared an apartment in Tucson. On the morning of August 15, 2007, Iris was home alone when Sarat-Rojop went to the apartment to return a cellular telephone he had borrowed from Marvin. Marvin had approached Sarat-Rojop a few days earlier apparently "upset" that Sarat-Rojop had incurred over $300 in charges that he had failed to pay.

¶3 When Sarat-Rojop told Iris that he wished to return the telephone, Iris opened the door. After a brief conversation, Sarat-Rojop threw Iris on the living room couch and attempted to kiss her. A struggle ensued and Sarat-Rojop threw Iris on another couch, where he grabbed her by the neck, touched her breasts, and tried to kiss her again. When Iris placed her hands over his face, Sarat-Rojop bit her finger. Sarat-Rojop repeatedly choked Iris during the struggle and, when Iris was lying on the floor between the kitchen and living room and was beginning to lose consciousness, Sarat-Rojop abruptly got up and left the apartment. Iris immediately called her girlfriend, who advised her to call 9-1-1.

¶4 Sarat-Rojop was charged with kidnapping, sexual abuse, and aggravated assault. Prior to trial, the state dismissed the aggravated assault charge. The jury acquitted Sarat-Rojop of sexual abuse and found him guilty of kidnapping, and the trial court sentenced him as noted above. This appeal followed.

Discussion

¶5 Sarat-Rojop argues the trial court abused its discretion by precluding him from mentioning during his closing argument that Iris "may have initiated the confrontation." He contends the error resulting from the preclusion of this argument prevented him from presenting a defense and denied him "his rights to due process of law, a fair trial by jury, and effective assistance of counsel, as guaranteed by the 5th, 6th and 14th Amendments" to the United States Constitution.

¶6 "Each side is permitted to argue its version of the evidence to the jury." *State v. Serna*, 163 Ariz. 260, 266, 787 P.2d 1056, 1062 (1990). And, "a defendant may argue any reasonable inference supported by the evidence." *State v. Wooten*, 193 Ariz. 357, ¶ 33, 972 P.2d 993, 1000 (App. 1998). However, "[t]he trial court is vested with great discretion in the conduct and control of closing argument and will not be overturned on appeal absent an abuse of discretion." *State v. Tims*, 143 Ariz. 196, 199, 693 P.2d 333, 336 (1985).

¶7 During trial, defense counsel explained to the trial court that Sarat-Rojop was not asserting a claim of self-defense. Counsel stated, however, that he was entitled to argue the "possibility" that the victim acted first, because it created reasonable doubt about Sarat-Rojop's guilt. Relying on *State v. King*, 225 Ariz. 87, 235 P.3d 240 (2010),

Sarat-Rojop argues on appeal that he was only required to show the "slightest evidence" to be entitled to make this argument, which he characterizes as a "reasonable-doubt theory of defense." He maintains the "slightest evidence" that Iris may have initiated the confrontation with Sarat-Rojop was evident from "[Iris] and her husband['s] . . . prior relationship with [Sarat-Rojop] and . . . animosity toward him over cell phone charges he had incurred on their account."

¶8 First, *King* does not support Sarat-Rojop's position. *King* addressed whether the trial court had erred in denying the defendant's request for a self-defense jury instruction. Here, Sarat-Rojop did not request a self-defense instruction and, in fact, expressly informed the court that he was not claiming self-defense. Second, even assuming the "slightest evidence" standard applies to his "reasonable-doubt theory of defense" generally, the trial court gave a reasonable doubt jury instruction.[1]

¶9 In denying defense counsel's request, the trial court found "there [wa]s absolutely no evidence in the record that this was mutual combat or self-defense or that the victim initiated and the defendant simply retaliated." We agree. "'Attorneys . . . are given wide latitude in their closing arguments to the jury.'" *State v. Moody*, 208 Ariz. 424, ¶ 154, 94 P.3d 1119, 1155 (2004), *quoting State v. Comer*, 165 Ariz. 413, 426, 799 P.2d 333, 346 (1990). "[C]ounsel may summarize the evidence, make submittals to the

[1]Because Sarat-Rojop expressly stated below and on appeal that he did not raise a claim of self-defense, we do not address the state's argument that the defense was untimely and thus waived pursuant to Rule 15.2(b), Ariz. R. Crim. P. *See State v. Stewart*, 139 Ariz. 50, 59, 676 P.2d 1108, 1117 (1984) (underlying principle of Rule 15 requirements is "'adequate notification to the opposition of one's case-in-chief in return for reciprocal discovery so that undue delay and surprise may be avoided at trial by both sides'"), *quoting State v. Lawrence*, 112 Ariz. 20, 22, 536 P.2d 1038, 1040 (1975).

jury, urge the jury to draw reasonable inferences from the evidence, and suggest ultimate conclusions." *State v. Bible*, 175 Ariz. 549, 602, 858 P.2d 1152, 1205 (1993). However, such arguments must not be based on matters which were not or could not have been received in evidence. *See State v. Zaragoza*, 135 Ariz. 63, 68, 659 P.2d 22, 27 (1983).

¶10 Here, the evidence showed only that Marvin was "upset" at Sarat-Rojop over the $300 cell phone bill. There was no evidence that Iris was upset or that she had attacked him first. Accordingly, defense counsel's attempt to argue to the contrary was based on sheer speculation. The trial court did not abuse its discretion in precluding Sarat-Rojop from arguing that Iris might have initiated the confrontation.[2]

¶11 Even assuming the trial court erred in precluding the argument that Iris might have initiated the confrontation, we would find the error harmless beyond a reasonable doubt. *See Bible*, 175 Ariz. at 588, 858 P.2d at 1191 ("Error . . . harmless if we can say, beyond a reasonable doubt, that the error did not contribute to or affect the verdict."). The court correctly instructed the jury that the attorneys' arguments were not evidence. And we presume the jury followed that instruction. *See State v. Tucker*, 215 Ariz. 298, ¶ 89, 160 P.3d 177, 198 (2007). Thus, absent any evidence to support Sarat-Rojop's proposed defense theory, counsel's argument would not have resulted in a different verdict.

[2]The other cases on which Sarat-Rojop relies are distinguishable. *See Conde v. Henry*, 198 F.3d 734, 739 (9th Cir. 1999) (some evidence presented that defendant did not commit robbery and defendant entitled to argue this in closing); *Herring v. New York*, 422 U.S. 853, 856, 864 (1975) (defendant's rights violated when trial court does not allow *any* closing argument).

Disposition

¶12 For the reasons stated above, we affirm Sarat-Rojop's conviction and sentence.

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

CONCURRING:

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Judge

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge